

SERVICE DATE - NOVEMBER 29, 1996

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

STB Ex Parte No. 529

CLASS EXEMPTION FOR ACQUISITION OR OPERATION OF  
RAIL LINES BY CLASS III RAIL CARRIERS UNDER  
49 U.S.C. 10902

Decided: November 18, 1996

In a decision served June 21, 1996, we adopted a class exemption in 49 CFR 1150, Subpart E, for the acquisition or operation of rail lines by Class III railroads under 49 U.S.C. 10902. Class Exem. for Acq. or Oper. - Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996) (Exemption).<sup>2</sup> The class exemption became effective on July 24, 1996.

On July 11, 1996, Joseph C. Szabo, the Illinois Legislative Director for United Transportation Union (IL-UTU) filed a petition to reopen the class exemption claiming material error. IL-UTU argues that the class exemption is inconsistent with another class exemption for Class III railroads in 49 CFR 1180.2(d)(2)<sup>3</sup> for continuance in control of a nonconnecting carrier. IL-UTU asserts that the class exemption here would permit a Class III carrier to acquire connecting track contrary to the restriction in the class exemption found at section 1180.2(d)(2).

IL-UTU also disputes our determination that section 10902 prevents us from imposing labor protection. It asserts that the statute should be interpreted to preclude imposing labor protection on the acquiring Class III carrier. Noting that the seller's employees would likely be affected by the transaction, IL-UTU contends that the Board should impose labor protection on the selling carrier and obligate it to provide labor protection for its employees.

On July 31, 1996, the American Short Line Railroad Association and Regional Railroads of America (ASLRA/RRA) jointly replied.<sup>4</sup> They assert that the class exemption involving nonconnecting carriers cited by IL-UTU is based on statutory authority in 49 U.S.C. 11323, et seq. (formerly section 11343, et seq.) and thus is irrelevant to the class exemption we granted

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to railroad acquisitions or operations that are subject to Board jurisdiction pursuant to 49 U.S.C. 10902.

<sup>2</sup> Notice of the rules was published in the Federal Register on June 24, 1996, at 61 FR 32355.

<sup>3</sup> The ICC regulations have been carried forward by section 204 of the ICCTA as regulations of the Board.

<sup>4</sup> In a letter dated July 31, 1996, the Association of American Railroads joined ASLRA/RRA's reply.

here under section 10902. Responding to IL-UTU's assertion regarding labor protection, ASLRA/RRA state that the statute clearly and unambiguously precludes the Board from imposing any labor protective conditions on a Class III acquisition or operation under section 10902.

#### DISCUSSION AND CONCLUSIONS

We will deny IL-UTU's petition. IL-UTU has not shown that reopening this proceeding is justified either by new evidence, changed circumstances or material error as required by 49 CFR 1115.3.

We do not agree that the new class exemption for Class III carriers conflicts with the class exemption in section 1180.2(d)(2) for continuance in control of a nonconnecting carrier. The latter class exemption is based on different provisions in the statute and has a different purpose.

The continuance in control class exemption involves authority under section 11323 of the ICCTA for a parent that controls an existing carrier or carriers to continue in control of a new noncarrier subsidiary when it subsequently becomes a carrier by acquiring a line that does not connect with the lines of any other of the parent's subsidiary carriers. The class exemption permits the parent to file a notice of exemption to continue in control of the nonconnecting subsidiary and to exempt the continuance in control from the prior approval requirements now contained in 49 U.S.C. 11323. Rail Consol. Proc.--Con. in Cont. of Nonconnecting Carrier, 2 I.C.C.2d 677 (1986). Should the lines of the subsidiary carriers connect, the notice of exemption is not available, but the parent may file a petition for exemption.<sup>5</sup> Under these circumstances, the noncarrier subsidiary would also file a directly-related notice of exemption for its acquisition or operation of the line under the class exemption from 49 U.S.C. 10901 provided at 49 CFR 1150.31-.35.

Before the enactment of the section 10902, Class II and Class III carriers were required to proceed under the provisions of former section 11343, et seq., where the competitive effect of the transaction is the principal consideration. Section 10902 creates a certification process for existing Class II and Class III carriers to seek approval of proposals to acquire and operate additional rail lines under criteria similar to section 10901. The class exemption we have adopted here enables existing Class III railroads to acquire or operate additional rail lines under section 10902 by filing a notice of exemption. The class exemption is patterned after our class exemption for noncarrier transactions at 49 CFR 1150.31-.35.

IL-UTU also asserts that we should impose labor protective conditions on the selling carrier, but submits no support for its position. In Exemption, at 104, we stated that section 10902 is unambiguous in that we may not impose any labor protection on a Class III carrier receiving authority under that section to operate or acquire rail property. And, the statute does not

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<sup>5</sup> See, e.g., H. Peter Claussen and Linda C. Claussen--Continuance in Control Exemption--Line, Oak, Perry & Georgia Railroad Company, Inc., Finance Docket No. 32813 (STB served Mar. 29, 1996).

provide the Board with even discretionary authority to impose labor protection on the selling carrier, regardless of the size of that carrier. Indeed, section 10902(c) explicitly precludes the Board from using its general conditioning authority to impose labor protection conditions without regard to whether the carrier is the buyer or the seller. Further, the ICC found that labor protection imposed on the selling carrier in a line sale transaction is passed through to the acquiring carrier in the form of a higher purchase price. Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 815 (1985), aff'd without opinion, Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Thus, imposing labor protection on the selling carrier would amount to imposing labor protection on the Class III acquiring carrier, and would amount to our doing indirectly what the statute clearly precludes us from doing directly. As a result, we have determined that no labor protection would be imposed on this class of transactions either on the buyer or the seller, and we conclude that IL-UTU has failed to show that our determination was material error.

Accordingly, IL-UTU's petition to reopen will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. IL-UTU's petition to reopen is denied.
2. This decision is effective on the date served.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams

Secretary